No. 3803

8-A

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

M. B. MOORE,
Attorney for Plaintiff in Error.

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STATEMENT OF THE CASE

I.

The above named plaintiff in error, M. LAMBERT, was arrested in the City of Reno, Washoe County, Nevada, on the 15th day of August, A. D. 1921. The agreed statement of facts show that he had driven in an automobile from Carson City, Nevada, to Reno, Nevada, and had stopped his machine on Second Street, in the City of Reno, Nevada, and while the machine was standing at the curb, J. P. Donnelley, the National Prohibition Director for the

District of Nevada, and Jonathan Payne, one of his assistants, went to Lambert's machine during his absence and found therein a box inclosed covered with a canvas, which was not examined; also a bottle lying in the tonneau of the machine near the said box about half full of reddish looking liquid. This was not examined either.

Prior to going to the machine, Donnelley had been informed by one C. R. Edison that he had seen the defendant near Carson—had seen him place a bottle with a reddish looking liquid in his car, and that the machine was standing on Second Street. Donnelley and Payne, after making the examination, retired some fifty odd feet away from the machine and waited there until the defendant came and got into his machine and started to back out away from the curb. They then went out, stepped upon the running board of the machine, showed the defendant their stars, and instructed him to drive to the Police Station, which the defendant did. Arriving at the Police station they placed him under arrest, took into their possession the bottle and box in question, also the automobile. The officers had no warrant for the arrest of the defendant, nor any search warrant for the searching of his automobile, or the seizure of the articles in question, and none had been issued.

Thereafter, the officers opened the box and examined its contents, as well as the contents of the bottle, had them analyzed and found that each contained corn whiskey.

An information was filed in the United States District Court for the District of Nevada charging the defendant with unlawful possession of intoxicating liquors and unlawfully transporting the same.

Prior to the plea to the information the defendant filed a petition in said Court praying and moving the Court for the return of the liquor in question to him, that it be suppressed and excluded as evidence against him upon his trial upon said information, and that the testimony of all witnesses relative to the search of the machine and the seizure of the liquors be excluded and suppressed, for the reason and on the grounds that the search of the machine, the seizure of the whiskey and machine, and the arrest of the defendant, were illegal and in violation of his Constitutional rights as guaranteed to him under the Fourth Amendment of the Constitution of the United States, and that the use of such testimony and evidence against him at his trial would be in violation of his Constitutional rights as guaranteed to him under the Fifth Amendment of the Constitution of the United States. The petition was denied by the Court, defendant brought to trial, convicted, sentenced to pay a fine of Five Hundred ($500.00) Dollars and costs. The necessary steps were taken to sue out a Writ of Error and an agreed statement of facts signed by the attorneys which appears in the Record, commencing on page 2 and ending on page 5 thereof. Also a stipulation filed that the said statement should constitute the Bill of Exceptions.

II.

There is but one question to be determined upon this Writ of Error, that is: Whether or not the arrest of the defendant, the search of the automobile, and the seizure of the contents thereof, and the seizure of the car, were legal? The Fourth Amend-

ment to the Constitution of the United States provides "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures should not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That portion of the Fifth Amendment of the Constitution of the United States referred to is as follows: "Nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law."

III.

That the search of one's person, his home, his property or effects, and the seizure thereof without a valid warrant therefor, is illegal, and that any evidence thereby secured in such search or seizure cannot be introduced or used in evidence against him at a trial upon a criminal charge growing out of his arrest as the result of such unlawful search and seizure, has been decided in the affirmative in innumerable instances, some of the leading cases are the following:

Weeks v. U. S. 232 U. S., 383, 58th L. Ed. 632;

Gouled v. U. S., In Supreme Court Advance Opinions of April 1st, 1921, page 311, published in the 65th L. Ed;

Lawrence Amos v. U. S., U. S. Supreme Advance Sheets of April 1st, 1921, page 316, also published in the 65th L. Ed;

Holmes v. U. S. 275th Fed. page 49, (opinion

from the Circuit Court of Appeals, Fourth Circuit);

Roy Louman, Appellant, v. Commonwealth of Kentucky, 13th A. L. R. Ann., page 1303; also found in the 224th Southwestern, page 860;

State of Wyoming v. Theo. Peterson, 13th A. L. R. Ann., page 1284.

IV.

The arrest of any person cannot legally be made without warrant therefor for an offense except felonies, unless committed in the presence of the officer making the arrest; and the search of a person, his property or effects, or their seizure cannot legally be made except upon lawful arrest or under the authority of a valid search warrant. This proposition is ably discussed and affirmatively decided in the following case:

Ex Parte J. Turner Rhodes, J. Turner Rhodes, v. Thomas McWilson, 1st A. L. R. Ann. page 568;

In Re: Kellam, 41st Pacific, page 960;

Roy Youman, Appellant, v. Commonwealth of Kentucky, 13th A. L. R. Ann. page 1303;

In the last cited case we find this statement by the Court: "Except that a person lawfully arrested "may be searched for property connected with the "offense, that may be used as evidence against "him, or for weapons or things that may assist es- "cape, or acts of violence, it is as great a violation "of the Constitution for an officer to search a "person, or baggage carried about by him without "a warrant authorizing it as it is to search his "premises." See:

Fidelity & G. Co. v. State, 83d So. 610, in

which we find the following statement by the Court,"The Constitutional guarantee is violated by "a search made by an officer without a warrant "of a suit-case intrusted by a passenger on alight- "ing from a train to a transfer man, who was "under suspicion of bringing liquor into the town "for unlawful sale.

"Constitutional provisions against unreasonable "searches and seizures and against compelling one "to be a witness against himself, secure the indi- "vidual in his person, his home and his property "from investigation through unbridled and unre- "strained and executive or administrative will."

People v. Marx Hausen, 3rd A. L. R. Ann. page 1505.

V.

The Government attempts to justify the arrest of the defendant, Lambert, and the search of his automobile and seizure of its contents upon two theories:

A. The information conveyed or given to the arresting officers, Donnelley and Payne by C. R. Edison, which was in substance, that he, Edison, had first seen the defendant at Dick Bright's Tavern, near Carson City, place a bottle containing a reddish liquid in his automobile, and that he followed the automobile to Reno and that it was located on Second Street in the City of Reno. We submit that this was insufficient evidence upon which to secure a search warrant to search the machine, as it amounted to nothing more than a bare suspicion in the mind of Edison that the defendant might have liquor in his possession; and the rule is well settled that a search

warrant cannot be issued except upon the filing of an affidavit stating facts sufficient to wararnt the magistrate in determining that probable cause exists that an offense has been committed against the Government and that the articles or goods in question are located at a particular place, which place must be described as well as the articles sought to be seized.

Weeks v. U. S., 232, 58th L. Ed. 632;

Gouled v. U. S., In Supreme Court Advance Opinions of April 1st, 1921, page 311, published in the 65th L. Ed;

Lawrence Amos v. U. S., U. S. Supreme Advance Sheets of April 1st, 1921, page 316, also published in the 65th L. Ed;

Holmes v. U. S. 275th Fed., page 49, (opinion from the Circuit Court of Appeals, Fourth Circuit);

Roy Youman, Appellant, v. Commonwealth of Kentucky, 13th A. L. R. Ann., page 1303; also found in the 224th Southwestern, page 860;

State of Wyoming v. Theo. Peterson, 13th A. L. R. Ann., page 1284;

U. S. v. Teaureand, 20th Fed. 620;

U. S. v. Baumart, 179th Fed. 735;

U. S. v. Michesloski, 265th Fed. 859;

In re : Rule of Court, 12,126 Fed. Cases, 3 Woods, 502.

In re: Kellam, 41st Pac. 960;

Ex Parte Rhodes, 1st A. L. R. 568.

B. That the offense was committed in the presence of the officers and that they therefore were justified in making the arrest, searching the automobile, and seizing its contents. The proposition embraced in the principle that an officer is justified in

making an arrest for a misdemeanor committed in his presence presupposes the actual knowledge of the officer that the offense is being committed in his presence, and this knowledge must be ascertained by the officer making the arrest through the senses, by seeing the same being committed, or some other means equally as convincing. The suspicion only that an offense may be committed, or might be, or had been committed, would not justify the arrest, the search, or the seizure. If such practice be allowed and be determined a legal procedure, then every traveler upon the road, whether on foot, on horseback, by carriage, automobile or otherwise, and every traveler any place, may be stopped by any officer at any time, or at any place, and his person and effects searched with the view on the part of the officer of determining whether or not an offense is being committed by him. The guarantee of the Fourth Amendment thus being destroyed and wiped away in the whim or caprice of any officer. On this proposition we cite the cases under subdivision "A" of this paragraph.

VI.

The guarantee of immunity from unreasonable search and seizure as provided in the Fourth Amendment is not confined to the person of the individual nor to the home of the individual, but extends to any of his property over which he holds and exercises the right of control, possession and dominion; that the arrest of the defendant in the manner described was unlawful there can be no question; that the search of his automobile and the seizure of its contents, and the consequent seizure of his automobile by the officers was unlawful, in our opinion cannot

be questioned. Within the term "effects" we find the reason for this assertion. The term "effects" in the Constitutional provision referred to is very very broad and includes all property of the individual which he owns, possesses or controls. It is so defined in civil proceedings, and if so defined and recognized in civil proceedings, why then, where the liberty of the individual and his Constitutional rights are involved, should it not be recognized in criminal proceedings.

In State v. Newell, 1st Mo. 248, the Court says:

"Effects in law means everything which is sub-
"ject to the laws of property and ownership,
"whether real or personal, and as to personality,
"whether of possession or in action."

In Hunter v. Case, 20th Vt. 195, the Court says:

"As effects is ordinarly used it is understood to
"mean goods, movables, and personal estate."

In Planters' Bank of Mississippi v. Sharp, 47th U. S. 301, 12th L. Ed. 447, the Court says:

"Effects means all kinds of personal estate."

Many authorities as to what constitutes effects, as used in the Constitutional provisions and the statutes, will be found cited in Words and Phrases, Vol. 3, page 2322.

VII.

The only authority found, and the one under which the officers in question acted, for the arrest of the defendant, the search of his automobile, and the seizure of its contents, and the seizure of the automobile, is found in Title II, Sec. 26, of the National Prohibition Act, which provides among other things:

"When the commissioner, his assistant, inspec-
"tors, or any officer of the law, shall discover any

"person in the act of transporting, in violation of "law, intoxicating liquors in any wagon, buggy, "automobile, etc., it shall be his duty to seize any "and all intoxicating liquors found therein being "transported contrary to law. Whenever intox- "icating liquors transported or possessed illegally "shall be seized by an officer, he shall take posses- "sion of the vehicle and team, or automobile, etc., "and shall arrest any person in charge thereof, "etc."

If it be contended that this provision of the Act gives to the officers the right and power without either warrant for the arrest of the individual or a valid warrant authorizing the search of his person or property and the seizure of such liquors, then our answer is that this section of the Act is unconstitutional. For the reason that Congress itself is without the power to pass a valid act conferring such extraordinary power and authority upon the officers, as such an act would be in direct contravention to the Fourth Amendment of the Constitution of the United States, supra. This proposition is well settled in the numerous cases hereinbefore cited, and particularly so in the following:

Ex Parte Rhodes, 1st A. L. R. 568;

In Re: Kellam, 41st Pac. 960;

Roy Youman v. Commonwealth of Kentucky, 13th A. L. R. 1303; also found in 224th Southwestern, 860.

VIII.

The courts, both State and Federal, have through a long and unbroken line of decisions universally held that the search of any one's person, home, papers or effects, and the seizure thereof with-

out a valid search warrant, was unlawful; unless the party was arrested or suspicioned of the commission of a felony, or unless there had been a warrant issued for the arrest of the party in question, and then upon his arrest his person may be searched upon a charge of a misdemeanor; and further, that an arrest may be made by an officer for a misdemeanor committed in his presence, and the person and immediate effects connected with the offense searched and taken into custody. We contend that under the light and authority of the decisions referred to, and particularly of those cited in this Brief, that the arrest of Lambert, search of his automobile, and seizure of its contents is absolutely without authority of the law, and that the Court erred in denying the petition for the return of the property and in the admission of the testimony relative to the arrest, the search and the seizure, and in denying defendant's motion for a new trial. For these reasons the writ of error should be sustained, the case reversed, and remanded to the District Court for the District of Nevada, with instructions to proceed in accordance with the rules of law as herein set forth.

Respectfully submitted,

M. B. MOORE,

Attorney for Appellant in Error.